TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 777.

JOHN DUCIE AND JAMES A. MURRAY, APPELLANTS,

vs.

THOMAS FORD.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF MONTANA

FILED APRIL 23, 1889.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., NOVEMBER 21, 1890.

a In the Supreme Court of the Territory of Montana.

JOHN DUCIE and JAMES A. MURRAY, Appellants,
vs.
THOMAS FORD, Respondent.

Transcript on Appeal.

Filed July 19th, 1888.

R. L. WORD, *Clerk.*

1 (*Amended Complaint.*)

In the Second Judicial District Court of the Territory of Montana in and for the County of Silver Bow.

JOHN DUCIE and JAMES A. MURRAY, Plaintiffs,
vs.
THOMAS FORD, Defendant.

The complaint of the plaintiffs respectively shows that on or about the 18th day of September, 1878, the above-named plaintiffs became possessed of and owned the premises hereinafter described and had discovered upon said premises a well-defined vein or lode of quartz in place, with at least one well-defined wall, which vein or lode contained gold, silver, and other valuable minerals; that on said day plaintiffs duly located said vein or lode and the premises hereinafter described as a mining claim under and by virtue of the laws of the United States and of this Territory, and posted a notice of such location thereupon and established by posts and corners well-defined boundaries thereto, and did all other acts and things requisite and necessary to be done to establish title to said premises in themselves as locators and owners thereof, and designated said mining claim as the "Figi" quartz lode mining claim, and within twenty days thereafter they made and filed for record a declaratory statement of said discovery and location, in writing and on
2 oath, in the office of the county recorder of Deer Lodge county, in which county said premises were then situate, which statement was recorded in Book "K" of Lode Locations, at page 182.

That plaintiffs continued to possess and own said premises from the said 18th day of September, 1878, until on about the 15th day of March, 1881.

That while plaintiffs so owned and possessed said premises the above-named defendant was about to proceed to procure a patent from the United States to himself for said premises under a pretended location and claim designated by him as the "Odin" lode; whereupon, about the month of February, 1881, the plaintiffs apprised the defendant that they claimed, owned, and possessed said premises under and by virtue of their aforesaid location of the "Figi" lode claim and would adverse and contest defendant's appli-

cation for a patent for said "Odin" lode claim; and that thereupon the defendant, well knowing that the plaintiffs had the right to said premises and owned the same, and well knowing that he, the said defendant, could not procure a patent for said premises if the plaintiffs adversed his application or asserted their rights, entered into a mutual and verbal agreement to and with the said plaintiffs, whereby the said defendant agreed with said plaintiffs that, for and in consideration of the plaintiffs promising and agreeing to relinquish and give up the possession of said premises to said defendant and to abstain from filing any adverse claim or protest in the United States land office at Helena, Montana, to or against defend-
3 ant's application for patent and permitting defendant to proceed and procure patent for said premises, and of their further agreeing that the defendant should after patent be tenant in common with them of one undivided half of said premises, plaintiffs and defendant should purchase said premises from the United States conjointly but in defendant's name; that he, defendant, would act as purchasing agent and as the trustee of the plaintiffs; purchase and procure patent for an undivided one-half of said premises for plaintiffs and one-half thereof for himself, and that any time after such patenting and the issuance of the patent he, the defendant, would, upon plaintiffs' demand, make, execute, and deliver to plaintiffs a good and sufficient deed of conveyance, conveying to plaintiffs the legal title to one undivided half of said premises.

That, relying upon the good faith and honesty of the defendant, plaintiffs thereupon relinquished and delivered their possession of said premises to the defendant, and that the defendant then and there was admitted and went into possession of the same in compliance with and under said agreement and said trust, and that the plaintiffs fully executed said agreement as far as in their power lay; that they withdrew all objections, protest, and adverse claims to or against the defendant's claim and abstained from filing any adverse claim or protest in the United States land office against defendant's application, and thereby permitted and enabled the defendant to procure a patent for said premises, and from
4 time to time thereafter paid to defendant their share of the purchase-money of said premises, and that thereafter, to wit, on or about the 15th day of May, 1881, the defendant, in pursuance of said agreement and of said trust, purchased from the United States of America, for the use and benefit of the plaintiffs, an undivided one-half of said premises, as well as another undivided one-half for his own use and benefit, and took from the register and receiver of said land office a certain final receipt for the purchase price of said premises.

That thereafter and on or about the 1st day of February, 1886, a patent was duly issued to said defendant, under his said application, by the United States of America, conveying and granting unto him all of said premises which are more particularly described as follows, to wit: Beginning at a granite stone 20 x 10 x 6 inches, on the west boundary of the Anaconda lode, marked 1 M. C. 70, for corner No. 1, from which the corners to sections 7 & 18, 12 & 13, T. 3 N.,

R. 7 & 8 W., bear N. 52 40′ W., 316 feet distant, running thence S. 11 07′ W. 351 feet to corner No. 2; thence S. 88 15′ W. 1,073 feet to corner No. 3; thence N. 11 07′ E. 440 feet to corner No. 4; thence S. 87 E. 1,057 feet to corner No. 1, the place of beginning, the said premises being designated in said patent as the "Odin" lode, and lying and being in Summit Valley mining district, Silver Bow (formerly Deer Lodge) county, Montana Territory, and being the same premises as those owned by plaintiffs, as hereinbefore alleged, and known as the "Figi," and that said agreement was and is performed and executed save as to the execution of a deed to the plaintiffs.

And plaintiffs allege that defendant so received and accepted said patent, grant, and conveyance in pursuance of the said agreement and as the trustee of these plaintiffs for the said undivided one-half of said premises, and that plaintiffs thereupon became and are confirmed in their ownership of said undivided one-half of said premises and entitled to the possession thereof, and that ever since the defendant has held and possessed the said undivided one-half of said premises as the trustee of these plaintiffs and for their sole use and benefit.

That after said defendant had received and accepted said patent the plaintiffs many times, and particularly on or about the 2nd day of August, 1886, demanded of and from said defendant a deed of conveyance of said undivided one-half of said premises, but defendant, while well knowing plaintiffs' rights, but striving to cheat and defraud said plaintiffs, and in wanton breach of his agreement and of his trust, wrongfully and unlawfully refused and ever has refused and still refuses to convey the same to plaintiffs, and wrongfully and fraudulently retains the use and benefit of all of said premises, and claims to own the whole thereof in his own right and not for or with plaintiffs.

That said undivided half of said premises is very valuable, and if defendant be not compelled by this honorable court to make restitution and convey to plaintiffs the said half of said premises plaintiffs will suffer great and irreparable hardship and pecuniary loss.

That it is impossible to restore the plaintiffs to the same position and condition as they were prior to the facts and agreement herein alleged, except by compelling and enforcing a full performance of said agreement on defendant's part and conveyance to the plaintiffs.

That if there be or if defendant claims that there is anything or any amount due by plaintiffs in connection with the procuring of said patent or with said agreement the plaintiffs are ready and willing and fully able to pay the same and offer to do so; that the defendant has refused to inform plaintiffs whether there was or whether he claimed that there was any money or thing due from plaintiffs, although requested to do so, and that plaintiffs have many times offered to pay defendant whatever he might claim that there was due in said connection, and that defendant has refused, and that on

account of said refusals of defendant plaintiffs are not informed in relation to said matter.

Wherefore plaintiffs pray judgment against the defendant as follows, to wit:

First. That defendant be declared to hold the legal title to said undivided one-half of said premises as trustee, in trust for the use and benefit of the plaintiffs.

Second. That he be directed to forthwith make, execute, and deliver to plaintiffs a good and sufficient deed of conveyance, conveying to plaintiffs said undivided one-half of said premises.

7 Third. That he be required to account to the plaintiffs for the rents, issues, and profits accrued from said undivided one-half of said premises, and, when found, that he be required to pay such rents, issues, and profits to plaintiffs.

Fourth. That plaintiffs have judgment for the costs of this action, and for such other and further order or relief in the premises as may be just.

WILLIAM SCALLON,
Plaintiffs' Attorney.

(Filed March 28th, 1887.)
(Verified.)

8 *Demurrer to Amended Complaint.*

Title of Court and Cause.

Now comes the above-named defendant and demurs to the amended complaint of plaintiffs herein, and as ground thereof assigns:

1st. That said complaint does not state facts sufficient to constitute a cause of action, among other things, in that said contracts, if any such there be, are null and void and within the statute of frauds; that no part performance of such contracts are set forth; and, further, that the plaintiffs are attempting to show an abandonment of real estate in favor of another party by a verbal agreement under which no acts were performed, and that mere delivery of possession to another does not pass title and cannot be given in evidence as affecting the transfer of real estate in this matter.

2nd. That said complaint is ambiguous, uncertain, and unintelligible, in this: that it does not show how much or at what times plaintiffs were to pay or did pay to Thos. Ford, defendant, any sum or sums of money, nor does it show what amount of money he is willing to pay, nor does he tender any amount whatever; that they allege they withdrew all adverse claim to defendant's application for patent and admit at the same time they never filed any; that it is uncertain in many other ways. Wherefore defendant asks judgment for his costs.

THOS. L. NAPTON,
Att'y for D'f't.

Filed March 28th, 1887.

9 *Order Sustaining Demurrer to Amended Complaint.*

Title of Court and Cause.

Demurrer to complaint sustained; exception to ruling noted; plaintiff answers that he will stand on the ruling when judgment is ordered for defendant for costs.

Judgment.

Title of Court and Cause.

Judgment by the court the 13th day of April, 1887.

This cause came on regularly for hearing on the demurrer to the amended complaint on the 9th day of April, 1887—William Scallon, Esq., appearing as counsel for the plaintiffs, and Thomas L. Napton, Esq., for the defendant. The demurrer to the amended complaint was argued by the respective counsel and the cause submitted to the court for consideration and decision; and, after due deliberation thereon, the court, on the 13th day of April, A. D. 1887, sustained said demurrer and, plaintiffs standing on their complaint, orders that judgment be entered herein for the defendant for his costs.

Wherefore, by reason of the law and premises aforesaid, it is ordered, adjudged, and decreed that the defendant, Thomas Ford, do have and recover of and from the plaintiffs said defendant's costs and disbursements incurred in this action, amounting to the sum of ten dollars.

Judgment entered December 30th, 1887.

Filed December 30th, 1887.

10 *Notice of Appeal.*

(Title of Court and Cause.)

To the above-named defendant and to Thomas L. Napton, Esq., his attorney, and to the clerk of said court:

Please take notice that the plaintiffs in the above-entitled action hereby appeal to the supreme court of the Territory of Montana from the final judgment herein made and ordered on the 13th day of April, 1887, and entered on the 30th day of December, 1887, in favor of said defendant and against said plaintiffs, and from the whole thereof.

Dec. 31st, 1887.

WM. SCALLON.

Due service of the above notice accepted and admitted and copy waived this 31st day of December, 1887.

THOS. L. NAPTON,
Att'y for Defendant.

(Filed December 31st, 1887.)

11 *Undertaking on Appeal.*

(Title of Court and Cause.)

Whereas the plaintiffs in the above-entitled action are about to appeal to the supreme court of the Territory of Montana from the judgment made and ordered in said action on the 13th day of April, 1887, and entered on the 30th day of December, 1887, in favor of the defendant in said action for his costs, taxed at ten dollars:

Now, therefore, in consideration of the premises and of such appeal, we, the undersigned, Patrick Conlon and Silas F. King, both of the county of Silver Bow, Territory of Montana, do hereby jointly and severally undertake and promise on the part of the appellants that the said appellants will pay all damages which may be awarded against them on the appeal or on the dismissal thereof, not exceeding the sum of three hundred dollars, to which amount we acknowledge ourselves jointly and severally bound.

PATRICK CONLON. [SEAL.]
SILAS F. KING. [SEAL.]

TERRITORY OF MONTANA, } ss:
County of Silver Bow, }

Patrick Conlon and Silas F. King, whose names are subscribed as sureties to the above undertaking, being severally duly sworn, each for himself says that he is one of the sureties to the above undertaking; that he is worth the sum in said undertaking
12 specified as the penalty thereof over and above all his just debts and liabilities, exclusive of property exempt by law from execution.

PATRICK CONLON.
SILAS F. KING.

Subscribed and sworn to before me this 31st day of Dec., A. D. 1887.

WILLIAM SCALLON,
Notary Public.

Filed December 31st, 1887.

WM. SHANLEY, *Clerk,*
By C. V. HENDERSON,
Deputy Clerk.

13 TERRITORY OF MONTANA, } ss:
County of Silver Bow, }

I, Frank E. Corbett, clerk of the district court of the second judicial district of Montana in and for the county of Silver Bow, hereby certify that the foregoing transcript on appeal in the case of John Ducie and James A. Murray *vs.* Thomas Ford is a full, true, and correct copy of the several papers contained therein as the same appear in the records and files of my office.

Witness my hand and the seal of said court this 22nd day of June, A. D. 1888.

[SEAL.]

FRANK E. CORBETT, *Clerk*,
By C. V. HENDERSON, *Deputy*.

14 *Judgment of the Court.*

In the Supreme Court of the Territory of Montana.

JOHN DUCIE and JAMES A. MURRAY
vs.
THOMAS FORD.

This cause came on this day for the decision and judgment of this court on appeal. Whereupon, on consideration, it is now here ordered and adjudged by this court that the judgment of the court below, entered in this cause on the 30 day of December, A. D. 1887, be, and the same is hereby, affirmed.

September 15th, 1888.

15 In the Supreme Court of the Territory of Montana.

JOHN DUCIE *et al.*, Plaintiffs and Appellants,
v.
THOMAS FORD, Defendant and Respondent.
} Opinion of the Court.

Appeal from the district court of the second judicial district *court* in and for the county of Silver Bow.

The complainants allege that in 1878 they discovered and located a mining claim known as the "Figi," situated in the county aforesaid, and in what is known as the Summit Valley mining district; that the necessary notice and declaratory statement were made, as required by the Federal and territorial laws, and that they were in the peaceable possession of the premises until the 15th of March, 1881; that pending their ownership and possession the defendant was about to proceed to procure a patent from the Government for the same land under a pretended location and claim designated as the "Odin" lode; whereupon the plaintiffs notified the defendant that they possessed and owned the land under and by virtue of their location of the "Figi" lode; that the defendant, well knowing that he could not obtain a patent for the premises if the plaintiffs filed an adverse claim, entered into the following verbal agreement with the complainants: They were to abstain from filing any adverse claim and to relinquish possession of the premises, and the defend-
ant was to procure the patent for the mine and afterwards
16 transfer to them an undivided half interest in the property.
The purchase was to be made conjointly, but in the name of the defendant, who was to act as agent and trustee for the plaintiffs to the extent of a half interest, as before stated, and upon demand execute to them a conveyance therefor.

They further aver that this agreement was carried out in good

faith on their part by deliveri[illegible]session of the premises and by abstaining from filing any adv[illegible]claim, thereby permitting and enabling the defendant to procure a patent for said premises, and thereafter, from time to time, paid to the defendant their share of the purchase price; that on or about the 15 day of May, 1881, the defendant obtained the final receipt from the land office for the purchase price of the land, and on the 1st of February, 1886, he obtained the Government patent for the mine which is fully described in the complaint. They further set forth that on the 2nd of August, 1886, they made demand on the defendant for a title to half the premises, but he refused to comply and claimed to be owner of the entire property.

In addition to these averments, they set forth their ability and willingness to pay whatever may be due by them towards procuring a patent or on account of the agreement, but the defendant refuses to accept anything or to say how much is due by the plaintiffs.

They aver bad faith and fraud on the part of the defendant, and because it is impossible to restore them to their original circumstances and position, they pray for an order decreeing them
17 to be the owners of a half interest in the property and for a specific performance, and for an accounting for rents, issues, and profits.

To this complaint the defendant demurred for the reason that it did not state facts sufficient to constitute a cause of action; 2nd, that if there be such a contract it is null and void for being within the statute of frauds; 3rd, that the complaint does not set forth the part performance; that it is ambiguous and uncertain, in this, that it does not show how much, if anything, they have paid defendant, nor how much they were to pay or are willing to pay; and it is contradictory, in that it alleges a withdrawal of adverse claims, and at another time that none were filed; and, further, that it alleges a payment to defendant at different times after patent of their share of the purchase-money, and in another place that they — willing to pay whatever may be due by them towards procuring the patent and in carrying out the agreement.

The demurrer being sustained, the plaintiffs elected to stand upon their complaint and appeal from a judgment rendered accordingly in favor of the defendant.

Possession and ownership of land has always been a matter of so much importance to the peace and happiness of society that the lawmaker has considered it particularly deserving of his care. Particularly was this the case in England, from whence we derive our statute of frauds, which was not only enacted to prevent frauds and perjury, but was also intended to place the title to real estate beyond the uncertainty of parol evidence, either on account of the
18 defects of memory or the interest, whims, or caprices of witnesses. So in all the States we find some corresponding law upon the subject, while the territorial legislature has declared in unmistakable language that every contract for an interest in lands shall be void unless the contract or some note or memorandum thereof expressing the consideration be in writing and

signed by the party leasing or s[illegible] Section 219 of the General Laws, R. S. Section 217 is even [illegible]e sweeping in terms, for it declares that no estate or interest in land, other than leases for the space of one year, shall hereafter be granted, created, assigned, surrendered, or declared unless by act or operation of law, or by deed or conveyance in writing, signed by the party or his lawful agent, creating, assigning, surrendering, or declaring the same. The wisdom of such a law is manifest, but never more apparent than in the present instance; for, notwithstanding the plain and emphatic terms of the statute, we find the parties to this litigation ignoring the law, making verbal contracts for an estate in lands, differing between themselves as to its terms, and appealing to the courts for relief from embarrassments created by their own acts.

The complainants base their right of action upon a resulting trust in their favor created by operation of law, but under the pleadings as presented in the record we are only required to pass upon the sufficiency of the complaint to take the case out of the statute of frauds and to sustain the equitable prayer for a specific performance.

19 Inasmuch as contracts within the statute of frauds are not illegal, but merely voidable, the sufficiency of the complaint is properly raised by a demurrer—a practice which is now considered well settled, though its propriety has frequently been doubted.

Story's Equity Pleadings, sec. 503.

Brown on Stat. of Frauds, secs. 508 & 509.

Plaintiffs rely upon these points especially to take the case out of the statute:

First. Abstaining from filing an adverse claim and relinquishing possession to the defendant.

Second. The fact of having paid their share of the purchase price after he obtained the patent.

Third. That it is impossible to restore them to their former situation, and therefore a specific performance is necessary to protect them from irreparable injury.

A careful examination of the complaint will show very plainly that the plaintiffs and defendant were each claiming adverse possession and ownership of the same mining claim or ground, and when the complainants, as they allege, relinquished their right of possession they conferred no additional or new right upon the defendant which he was not already claiming to exercise and in possession of. Relinquishing a disputed possession and abstaining from prosecuting an adverse claim, which was never filed, do not show the parties to be in a position different from that which

20 they might have occupied if there had been no contract made.

The plaintiffs at best and according to their own showing refrained from exercising a litigious right and relinquished a precarious and doubtful possession. Obviously these acts were merely ancillary or preparatory to the main verbal contract, which was that the defendant should patent the mine and then sell the complainants a half interest therein.

The case is not nearly so strong for the complainants as where the purchaser of lands under a verbal contract has bound himself on the faith of that contract to make a lease of the land, and his so doing is not regarded as part performance. Whitechurch *vs.* Benis, 2 Bo. C. C. Ch. (S. C.), 171. So also has it been held in O'Riley *vs.* Thompson, 2 Cox, 271, that where the defendant agreed with the plaintiff to convey land to him upon his procuring a release from another person, which the plaintiff accordingly did at much expense, it was not part performance, but merely an act preparatory to the agreement. Before parol evidence can be introduced there must be shown a part performance, and the acts relied upon for that purpose must be such as unequivocally prove the contract alleged, for if they can otherwise be accounted for they do not prove a sale.

Brown on Stat. of Frauds, secs. 454 & 455.

Roberts on Frauds, 155; 4 Wall., 513.

We have no difficulty in holding that refraining to prose-
21 cute an adverse claim which never was filed and relinquishing a disputed mining claim do not constitute a part performance of a verbal contract whereby the defendant was to procure a patent to the mine and transfer a half interest to the complainants. Such acts may be accounted for in many ways, and in themselves do not in any way tend to prove the main contract.

Under the authorities referred to, it would seem that the part performance must be of the contract to sell & convey, and acts merely introductory or preparatory to the defendant attaining the title or patent do not fall within purview of the law of part performance.

Another fact is relied on by the complainants as showing part performance, and that is the allegation of payment to the defendant of their share of the purchase-money after he had obtained the patent. On this point the complaint is ambiguous, uncertain, contradictory, and wholly insufficient. In one place it alleges having paid complainants' share of purchase-money to defendant, and in another it alleges an ability and willingness to pay their share of the expense of procuring the patent on account of the agreement if defendant will accept the same and state how much they owe. Nowhere in the complaint do the plaintiffs state the amount or date of any payments to the defendant, the value of the property, nor what monied consideration they were to pay for a half interest in the property. The complaint is silent as to the money with which the purchase was to be made, and it distinctly alleges that the pur-
chase was to be made by the defendant, and it is equally
22 clear that no money of the plaintiffs was ever used in making the purchase.

Taking the most favorable view for the plaintiffs, the allegations on this point are wholly insufficient to take the case out of the statute, for "by an unbroken current of authorities running through many years it is settled too firmly for question that the payment even of the whole amount of the purchase-money is not deemed

part performance so as to justify a court of equity in enforcing the contract."

Brown on the Stat. of Frauds, sec. 461, and authorities there cited.

Purcell *vs.* Miner, 4 Wall., 513.

Upon the allegations of the complaint we fail to see any mutuality of obligation by which the defendant could have compelled the plaintiffs to contribute had the venture been unprofitable.

This feature of the contract must be made to appear whenever a decree for specific performance is sought, or else the relief must be denied. "A party not bound by the agreement itself has no right to call upon the court to enforce performance against the other contracting party by expressing his willingness in his bill to perform his part of the agreement."

Mayger *vs.* Cruse, 5 M., 497.

Pom. Specific Performances, secs. 163 & '4.

Ryan *vs.* ——, 4 Mont., 354.

In the last-mentioned case it was held that a verbal agreement for the sale of real estate is void under the statute of frauds in Montana, and a specific performance will not be decreed when
23 there is no mutuality of remedy and obligation.

In suits for specific performance the party complaining must not only show the acts relied on as part performance, his willingness and ability to perform his part of the contract, but it also must appear that his position is such that an action at law for damages will not afford him adequate relief. (Brown on Stat. of Frauds, sec. 452.)

We have many authorities to the effect that money paid in part is not deemed part performance and may be recovered thusly, showing that the plaintiff is not without his remedy.

Roberts on Frauds, 134.

Federal Digest Equity, sec. 123, and authorities there cited.

Purcell *vs.* Miner, 4 Wall., 513.

The number of conflicting authorities on this question of specific performances is only known to the investigator and is almost endless in variety and nice shades of distinction; in fact, to such an extent do they differ that a question like that under consideration may be decided either way, and on very respectable authority.

But in such a labyrinth of legal lore it is our manifest duty to give effect to the plain and obvious construction of the statute, and in doing so it is to the interest of society that there should be as little refinement upon the law as is possible, for the more fixed and certain the rule the easier it is for the individual to square his conduct in such a way as to entitle him to the protection of the law.

Finally we come to the consideration whether a cause of
24 action is sufficiently set forth in the complaint. In stating their case the plaintiffs should allege every fact which it was necessary for them to prove in order to have succeeded in this ad-

verse claim, had they filed one. It is not enough for the complaint to allege that the mining laws had been complied with, for such an averment is merely a legal conclusion; and so also is the allegation of right of possession and ownership of the claim in dispute.

Meyendorf *et al. vs.* Frahne *et al.*, 3 Mont., 323.

Payne *et al. vs.* Tredwell, 16 California, 221.

It is for the court to say, from the facts stated and proven, whether or not the law has been complied with to that extent which would have entitled the complainants to the patent. In other words, it was not only necessary for the complaint to show that the plaintiffs made the discovery and location, marked the boundaries of the mine, filed their notice and declaratory statement, with proper description by reference to some natural object or permanent monument, and that they were in possession as owners from the time of discovery, but it was indispensable and material for them also to set forth in their complaint that they were either citizens of the United States or had filed their declaration of intention of becoming so, and that up to the time of the application by defendant for a patent for the Odin claim they had complied with the law, which required them to expend a hundred dollars a year in improving the mine.

The mineral lands are reserved by the Government for its citizens and those aliens who have filed their declaration of intention
25 of becoming such, and it is immaterial whether there has been a discovery, location, and faithful compliance with all other requirements if this indispensable prerequisite is wanting; and it is equally clear that a location may be abandoned by the claimant failing to do the necessary amount of work on the mine to "represent" it. Indeed, no one is allowed to have a patent for a mining claim without making satisfactory proof of having expended the required amount in money or labor each year in developing the mine; and it is also quite plain that one may possess and claim to own a piece of mining ground without ever being able — or entitled to a patent therefor. When, therefore, the complainants failed to make allegation of their capacity to take title, and of having done the necessary amount of work each year "to represent" the mine, along with the other facts stated in the complaint, they failed to set forth a cause of action. The omissions were fatal to their suit.

Indeed, it is impossible to tell from the complaint whether the plaintiffs have the requisite capacity to accept a title to the mine even if decreed them by the court. To decide the case without this allegation, which we cannot supply, would be doing a vain and useless thing. In a contest between a citizen and an alien for a patent to a mining claim there can be no doubt that the latter's pretensions would be invalid. Hence the absolute necessity in a case like the one at bar for the allegation of capacity.

We see no error in the judgment of the lower court, and it
26 is therefore affirmed at cost of appellant.

M. J. LIDDELL, *Asso. J.*

We concur:

N. W. McConnell, C. J., concurs on the ground only that the contract was void under the statute of frauds.

S. DE WOLFE, *Asso. J.*

Filed September 15th, 1888.

R. L. WORD, *Clerk.*

27 In the Supreme Court of the Territory of Montana.

JOHN DUCIE and JAMES A. MURRAY, Plaintiffs and Appellants, *v.* THOMAS FORD, Defendant and Respondent. } Order Granting Appeal.

The above-named plaintiffs (complainants) and appellants, John Ducie and James A. Murray, conceiving themselves aggrieved by the final judgment and decision made and entered in the said supreme court of the Territory of Montana, in the above-entitled cause, on the 15th day of September, 1888, do*th* hereby appeal therefrom to the Supreme Court of the United States, said cause being a suit in equity; and they pray that this appeal may be allowed, and that a transcript of the records and proceedings in the case, duly authenticated, may be sent to the Supreme Court.

WM. SCALLON,
Attorney for Plaintiffs and Appellants.

And now, to wit, on the 15th day of November, 1888, it is ordered that the appeal be allowed as prayed for.

N. W. McCONNELL,
Chief Justice of the Supreme Court of the Territory of Montana.

Filed November 15th, 1888.

R. L. WORD, *Clerk.*

28 In the Supreme Court of the Territory of Montana. July Term, A. D. 1888.

JOHN DUCIE and JAMES A. MURRAY, Appellants, *vs.* THOMAS FORD, Respondent. } Bond on Appeal.

THE UNITED STATES OF AMERICA, *Territory of Montana.* } *ss:*

Know all men by these presents that we, John Ducie and James A. Murray, principals, and W. G. Gwin and David McCranor, both of Butte, Silver Bow county, Territory of Montana, as sureties, are held and firmly bound unto Thomas Ford, the above-named respondent, in the sum of one thousand dollars, to be paid to the said

Thomas Ford, his executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals. Dated this 13th day of November, 1888.

Whereas the above-named John Ducie and James A. Murray have prosecuted an appeal to the Supreme Court of the United States to reverse the judgment and decision of the supreme court of
29 the Territory of Montana, made in the above-entitled action on the 15th day of September, A. D. 1888:

Now, therefore, the condition of this obligation is such that if the above-named John Ducie and James A. Murray shall prosecute their said appeal to effect and answer all costs and damages if they shall fail to make good their plea, then the obligation shall be void; otherwise to remain in full force and effect.

JOHN DUCIE. [SEAL.]
JAMES A. MURRAY. [SEAL.]
W. P. GWIN. [SEAL.]
DAVID McCRANOR. [SEAL.]

UNITED STATES OF AMERICA, }
Territory of Montana, } *ss:*

William P. Gwin and David McCranor, being severally duly sworn, depose and say and each for himself saith—

That he is one of the sureties to the foregoing bond, and that he is worth the sum of one thousand dollars over and above all his just debts and liabilities and exclusive of property exempt by law from taxation.

W. P. GWIN.
DAVID McCRANOR.

Subscribed and sworn to before me, at Butte, Silver Bow county, Montana Territory, this 13th day of November, 1888.

CALEB E. IRVINE,
United States Commissioner.

30 I approve the above bond and the sufficiency of the sureties thereto.

N. W. McCONNELL,
Chief Justice of the Supreme Court of the Territory of Montana.

Filed November 15th, A. D. 1888.

R. W. LORD, *Clerk.*

31 In the Supreme Court of the United States of America, *ss:*

JOHN DUCIE and JAMES A. MURRAY, Appellants,
vs.
THOMAS FORD, Respondent.

UNITED STATES OF AMERICA, *ss:*

To Thomas Ford:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday in October, 1889, pursuant to an appeal filed in the office of the clerk of the supreme court in and for Montana Territory, wherein John Ducie and James A. Murray are appellants and you respondent, to show cause, if any there be, why the judgment appealed from should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable N. W. McConnell, chief justice of the supreme court for Montana Territory, this 15th day of November, one thousand eight hundred and eighty-eight.

N. W. McCONNELL,
Chief Justice of Supreme Court of Montana Territory.

31½ [Endorsed:] John Ducie & *al.*, app'l'ts, *vs.* Thomas Ford, resp't. Citation. Filed Nov. 30th, 1888. R. L. Word, clerk.

I hereby certify and return that on the 23d day of November, A. D. 1888, in the county of Deer Lodge, Montana Territory, I personally served the within citation on the within-named Thomas Ford by exhibiting to him this original, with the signature of the chief justice affixed, and at the same time delivering to him a true copy thereof.

R. S. KELLEY,
U. S. Marshal, District of Montana.

Deer Lodge City, Mont., November 24th, 1888.

Marshal's fees:

Service of citation	2 00
Actual expenses in lieu of mileage:	
R. R. fare from Deer Lodge to Stuart & return	2 80
Dinner at Stuart	50
Use of horse from Stuart to Ford's ranch & return to Stuart	2 00
	$7 30

32 In the Supreme Court of the Territory of Montana.

JOHN DUCIE and JAMES A. MURRAY, Appellants,
vs.
THOMAS FORD, Respondent.
} Affidavit of Value.

UNITED STATES OF AMERICA,
Territory of Montana, County of Silver Bow, } *ss:*

Green Majors, being duly sworn, doth depose and say that he is a real-estate agent and mining broker, residing at Butte, in Silver Bow county, Montana Territory, and there doing business; that he knows the Odin lode claim, and that the same is in controversy in the above-entitled action as to one-half thereof; that the matter in dispute herein, to wit, the one-half, undivided, of said "Odin" claim, which is situate in said county, exclusive of costs, exceeds in value the sum of five thousand dollars.

GREEN MAJORS.

Subscribed and sworn to before me this 13th day of November, A. D. 1888.

CALEB E. IRVINE,
United States Commissioner.

Filed November 15th, 1888.

R. L. WORD, *Clerk.*

33 TERRITORY OF MONTANA,
County of Lewis & Clarke, } *ss:*

I, R. L. Word, clerk of the supreme court of the Territory of Montana, do hereby certify that the foregoing transcript on appeal in the case of John Ducie and James A. Murray, appellants, and Thomas Ford, respondent, is a full, true, and correct copy of the several papers contained therein as they appear on file and of record in my office.

Witness my hand and the seal of the said court this 25th day of February, A. D. 1888.

[Seal Supreme Court, Montana Territory.]

R. L. WORD,
Clerk of the Supreme Court of the Territory of Montana.

Endorsed on cover: Montana Territory Supreme Court. No. 777. John Ducie and James A. Murray, appellants, *vs.* Thomas Ford. Filed April 23, 1889.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1890.

No. 777.

John Ducie and James A. Murray

v.

Thomas Ford.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF MONTANA.

ARGUMENT FOR APPELLANTS.

WALTER H. SMITH,
Attorney for Appellants.

WASHINGTON, D. C.:
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1890.

32 In the Supreme Court of the Territory of Montana.

JOHN DUCIE and JAMES A. MURRAY, Appellants,
vs.
THOMAS FORD, Respondent.
} Affidavit of Value.

UNITED STATES OF AMERICA,
Territory of Montana, County of Silver Bow, } ss:

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GREEN MAJORS.

Subscribed and sworn to before me this 13th day of November, A. D. 1888.

CALEB E. IRVINE,
United States Commissioner.

Filed November 15th, 1888.

R. L. WORD, *Clerk.*

33 TERRITORY OF MONTANA,
County of Lewis & Clarke, } ss:

I, R. L. Word, clerk of the supreme court of the Territory of Montana, do hereby certify that the foregoing transcript on appeal in the case of John Ducie and James A. Murray, appellants, and Thomas Ford, respondent, is a full, true, and correct copy of the several papers contained therein as they appear on file and of record in my office.

Witness my hand and the seal of the said court this 25th day of February, A. D. 1888.

[Seal Supreme Court, Montana Territory.]

R. L. WORD,
Clerk of the Supreme Court of the Territory of Montana.

Endorsed on cover: Montana Territory Supreme Court. No. 777. John Ducie and James A. Murray, appellants, *vs.* Thomas Ford. Filed April 23, 1889.

Office Supreme Court U. S.
FILED,
JAN 7 1891
JAMES H. McKENNEY,
CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1890.

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John Ducie and James A. Murray

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APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF MONTANA.

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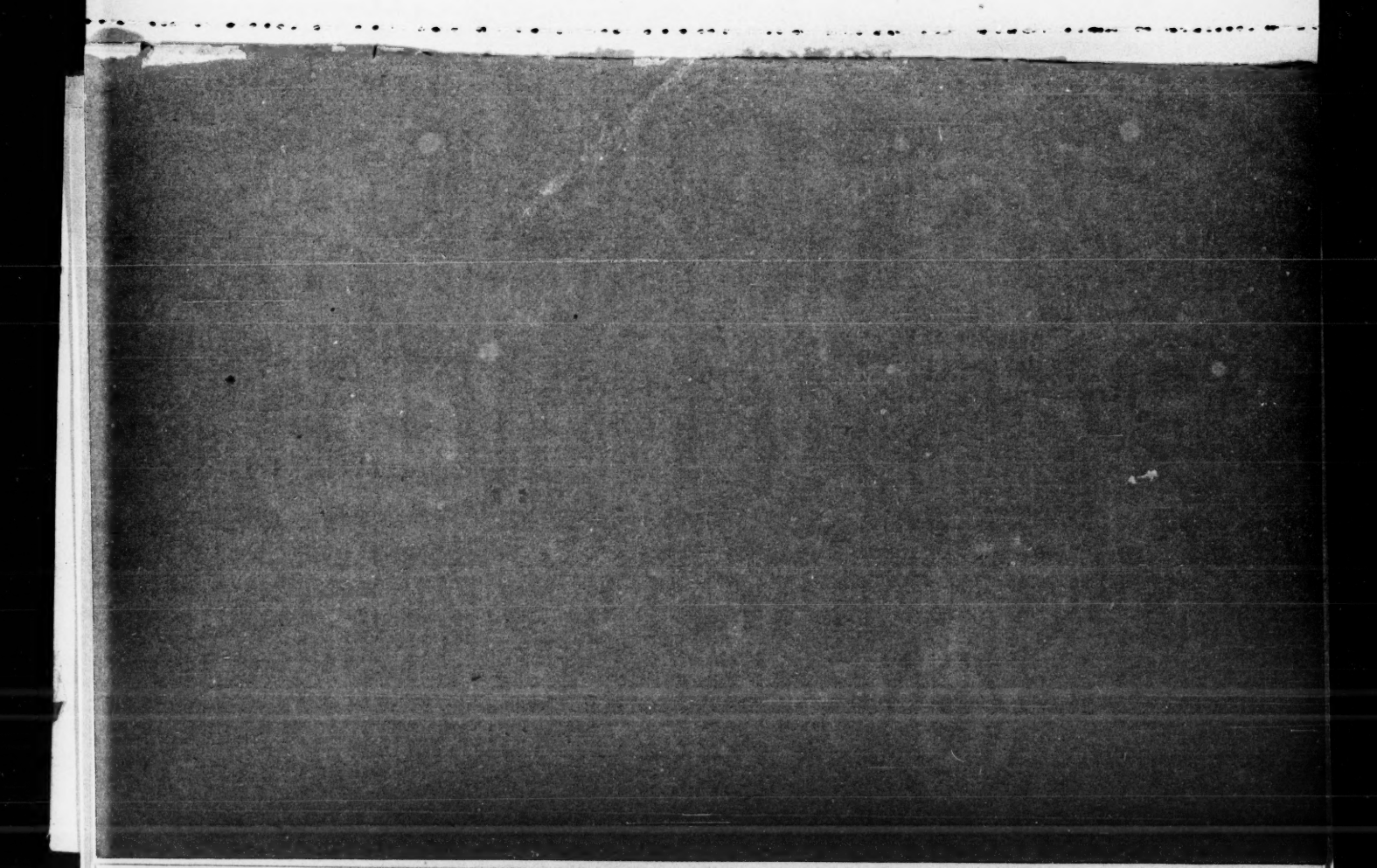

In the Supreme Court of the United States.

OCTOBER TERM, 1890.

JOHN DUCIE AND JAMES A. MURRAY
v.
THOMAS FORD.

No. 777.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF MONTANA.

THE CASE.

The amended complaint filed March 28, 1887, in the Second Judicial District Court of the Territory of Montana, in and for the county of Silver Bow, alleges that said plaintiffs, John Ducie and James A. Murray, on or about the 18th day of September, 1878, became possessed of and owned the premises thereinafter described, and had discovered upon said premises a well-defined vein or lode of quartz in place, with at least one defined wall, which vein or lode contained gold, silver, and other valuable minerals; that on said day plaintiffs duly located said vein or lode and the premises thereinafter described as a mining claim under and by virtue of the laws of the United States and the Territory of Montana, and posted a notice of such lo-

cation thereupon, and established by posts and corners well-defined boundaries thereto, and did all other acts and things requisite and necessary to be done to establish title to said premises as locators and owners thereof, and designated said mining claim as the "Figi" quartz lode mining claim, and that they, within twenty days thereafter made and filed for record a declaratory statement of said discovery and location in writing on oath, in the office of the county recorder of Deer Lodge county, in which county the premises were then situated, which statement was recorded in Book "K" of Lode Locations at page 182; that plaintiffs continued to possess and own said premises from the said 18th day of September, 1878, until on or about the 15th day of March, 1881; that while the plaintiffs so owned and possessed said premises the said defendant, Thomas Ford, was about to proceed to procure a patent to himself for said premises under a pretended location and claim designated by him as the "Odin" lode, whereupon about the month of February, 1881, the plaintiffs apprised the defendant that they claimed, owned, and possessed said premises under and by virtue of their aforesaid location of the "Figi" lode claim, and that they would adverse and contest the defendant's application for the said "Odin" lode claim, and that thereupon the defendant, well knowing that the plaintiffs had the right to said premises and that they owned the same, and well knowing that he could not procure a patent for the same if these plaintiffs adversed the same and asserted their rights, entered into a mutual and verbal agreement with plaintiffs, whereby he agreed with the plaintiffs that for and in consideration of the plaintiffs promising and agreeing to relinquish and give up the possession of said premises to the defendant, and to abstain from filing any adverse claim or protest in the United States Land Office at Helena, Mon-

tana, against the application of the defendant, and permitting him to proceed and procure said patent, and of the further agreement that they should be tenants in common with the defendant in said premises of one undivided half of the same after patent, and that the defendant should purchase said premises of the United States conjointly, with plaintiffs, but in the defendant's name, and that the defendant should act as the purchasing agent and as the trustee of the plaintiffs; that he, said defendant, would purchase and procure a patent for said premises, the one-half for himself and the other half for plaintiffs, and that he would, after the issuing of the patent, at any time upon the demand of plaintiffs, make, execute, and deliver to them a good and sufficient deed of conveyance which should convey one undivided half of said premises.

The complaint further alleges that the plaintiffs, relying upon the honesty and good faith of the defendant, relinquished and delivered their possession of said premises to the defendant, and that the defendant then and there was admitted into and went into possession of said premises under and in compliance with said agreement and said trust, and that the plaintiffs fully executed said agreement so far as lay in their power; that they withdrew all objections, protest, and adverse claims to or against the defendant's claim, and that they abstained from filing any adverse claim or protest in the United States Land Office to defendant's application, and thereby permitted and enabled the defendant to procure a patent for said premises, and plaintiffs paid to the said defendant their share of the purchase money for said premises; and thereafter, on or about the 15th of May, 1881, the defendant, in pursuance of said agreement and trust, purchased from the United States for the use and benefit of plaintiffs, one undivided half of said premises and one

undivided half for his own use and benefit, and took from the register and receiver of said land office a final receipt for the purchase price of said premises.

The complaint further alleges that thereafter, on or about the 1st day of February, 1886, a patent issued granting to the defendant all of said premises, and gives a full description of the same (which description is here omitted), and that the said premises included in said patent are the same premises that were owned by the plaintiffs as before set forth, and known as the "Figi," and that said agreement was and is performed and executed, with the exception of the deed to the plaintiffs.

The complaint further alleges that the defendant received and accepted said patent under said agreement, and as trustee of plaintiffs, for the one undivided half of said premises for their sole use and benefit, and that the plaintiffs after the execution and delivery of the patent have many times, and particularly on or about the 2d day of August, 1886, demanded of the defendant a deed of conveyance for the one undivided half of said premises, but that he has wrongfully and unlawfully refused and still does refuse to execute and deliver the same, but claims to own all of said premises in his own right; and that said undivided one-half is very valuable, and that unless the defendant be compelled by this Court to convey the same to plaintiffs they will suffer great and irreparable hardship and pecuniary loss; and that it will be impossible to restore them to their original condition except by compelling a full performance of said agreement by the defendant.

The complaint alleges that the plaintiffs are ready, able, and willing, and have offered to pay the defendant any amount due to the defendant, if there is any, in connection with the procuring of said patent, and have re-

quested the defendant to inform them what, if any, was due to him, but he has refused to inform them.

The complaint prays that the defendant may be declared to hold the one undivided half of said premises, as trustee, in trust for the plaintiffs' use and benefit, and that he may be directed to convey the same to them and to account for the rents and profits accruing therefrom.

To this amended complaint the defendant demurred. The demurrer was sustained by the district court, and final judgment given for the defendant on the demurrer.

On appeal the Supreme Court of the Territory affirmed the judgment of the court below.

Provisions Contained in the Compiled Statutes of Montana.

"Sec. 100. In the construction of a pleading for the "purpose of determining its effect, its allegations must "be liberally construed with a view to substantial justice "between the parties."

Comp. Stat. 85.

"Sec. 119. The court shall, in every stage of an action, "disregard any error or defect in the pleadings or pro- "ceedings which shall not affect the substantial rights of "the parties, and no judgment shall be reversed or effected "by reason of such error or defect."

Do. 89.

"Sec. 217. No estate or interest in lands, other than "for leases for a term not exceeding one year, or any trust "or power over or concerning lands, or in any manner "relating thereto, shall hereafter be created, granted, as- "signed, surrendered, or declared, *unless by act or opera- "tion of law*, or by deed or conveyance in writing, sub- "scribed by the party creating, granting, assigning,

" surrendering, or declaring the same, or by his lawful " agent thereunto lawfully authorized in writing."
Do. 657.

"SEC. 218. The preceding section shall not be consid- " ered to affect in any manner the power of a testator in the " disposition of his real estate by a last will and testament, " *nor prevent any trust arising or being extinguished by* " *operation of law.*"
Do. 652.

"SEC. 219. Every contract for the leasing for a longer " term than one year, or for the sale of any lands or inter- " est in lands shall be void, unless the contract or some " note or memorandum thereof expressing the considera- " tion be in writing and be subscribed by the party by " whom the lease or sale is to be made."
Do. 652.

"SEC. 221. Nothing contained in this chapter shall be " construed to abridge the power of the court to compel " the specific performance of such agreements."
Do. 652.

ASSIGNMENT OF ERROR.

The Supreme Court of the Territory erred in sustaining the demurrer to the amended complaint and affirming the judgment of the court below.

ARGUMENT.

From the statement of the case, as admitted by the demurrer, it is perfectly apparent that equity and good faith demand that the defendant should comply with his agreement and convey to the plaintiffs the one undivided half of the patented premises. There can be no difference of

opinion upon this point. The defence is technical and confessedly not upon the merits. It is that the complaint is defective in its statements and that all relief is denied by the statute of frauds, the contract not being in writing.

I shall first consider the objections to the complaint made by the court below. It was held by a majority of the court (two judges, the chief-justice not concurring) that the complaint was fatally defective because it did not allege that the plaintiffs were either citizens of the United States or had declared their intention to become such, or that they had expended one hundred dollars per year on their mining claim.

This point seems to have originated with the court. It was not made by the defendant's counsel.

Is it well taken? The complaint alleges that the plaintiffs, on the 18th of September, 1878, possessed and *owned* the mining premises, and that they had duly located a mining claim thereon under the laws of the United States and the Territory, and posted a notice of such location, established by posts and corners and well-defined boundaries, and that they "did all other acts and things requisite "and necessary to be done to establish title to said prem-"ises in themselves as locators and owners;" that they designated the claim as "Figi," and within twenty days made and filed for record a declaratory statement of their discovery and location, in writing and on oath, in the office of the county recorder of Deer Lodge county, in which county the premises were then located, which statement was recorded in Book "K" of Lode Locations, at page 182, and that they "continued to possess and *own* "said premises from the said 18th day of September, 1878, "until on or about the 15th day of March, 1881;" that while the plaintiffs "*owned* and possessed said premises," the defendant made the agreement that "the defendant

" well knowing that the plaintiffs had the right to the same " and *owned* the same," &c.

These various allegations construed strictly even, and not liberally as required by Sec. 100, Comp. Stat., are direct allegations that plaintiffs owned the premises.

Ownership is not merely a conclusion of law, it is also an allegation of facts upon which the conclusion of law rests.

In *Stoutenberg* v. *Lybrand*, 13 Ohio State, 228, Scott, Judge, said :

" No facts are stated in the petition, which show that " Evans, by whose assignment the plaintiff claims title, had " any interest in the note, or power to assign it, except the " averment that Evans was, at the time of the assignment, " the *owner* and holder of it. * * * But such allega- " tions are not mere conclusions of law. Ordinarily and " in contracts and business transactions, they are regarded " as allegations of the facts upon which the legal conclu- " sion rests, as well as the conclusion itself."

The court below said :

" In stating their case the plaintiffs should allege every " fact which it was necessary for them to prove in order " to have succeeded in the adverse claim, had they filed " one."

According to this rule of pleading it would be necessary in a declaration in ejectment at common law to allege every conveyance which was necessary to show that the party who demised the premises, by virtue of which demise the plaintiff " entered into the said tenements with the appur- " tenances and became and was thereof possessed," had rightfully demised the same.

And I do not see, upon principle, why a party who alleged that he had a patent for land and was entitled to the

possession thereof, and brought suit for its recovery, should not be required to allege all the necessary steps antecedent to the patent. Even upon the theory of the court below, the omission to state citizenship and performing the yearly work and labor, was but a defective statement of the plaintiff's cause of action and did not affect "the substantial "right of the parties," and should have been disregarded as directed by sec. 119, Comp. Stat. above quoted.

The court below took exception to the manner of the statement of the purchase-money and expense for procuring the patent, and held that it was ambiguous, uncertain, contradictory, and wholly insufficient.

The complaint alleges that the purchase was to be made jointly, and that the plaintiffs, *before* the purchase, paid to the defendant their share of the purchase money.

How much that purchase money amounted to was fixed by sec. 2325 of the Revised Statutes of the United States, which required a payment of five dollars per acre. The survey required to be made before application for patent could be made fixed the acreage, and that fixed the amount of the purchase money. This, according to the petition was paid at some time between the month of February, 1881, and the 15th of May, 1881, at which time the purchase money was paid to the register and receiver.

The moneys to be paid to the defendant other than the purchase money, were those "in connection with the pro- "curing of said patent." This would include the expense of employing an attorney to prepare the application and see to its filing with the register, and take charge of the claim before the local officers, and also the expense of employing counsel to take charge of the case before the Commissioner of the General Land Office. From the nature of the case the plaintiffs could not state what that expense

was. It was a matter peculiarly within the knowledge of the defendant. The complaint alleges that the plaintiffs requested the defendant to inform them what it was, and that they were ready and willing and able, and offered to pay the same to the defendant.

I fail to see anything ambiguous, uncertain, or contradictory in this.

I now come to the real question in this case: *Is it within the statute of frauds?*

I claim that it is not, and for two reasons:

I. It is a trust by operation of law, and is therefore within the express exception contained in said sections 217 and 218.

II. There was such part performance by taking possession under the contract as takes it out of the statute.

I. The case made in the complaint is one of a resulting trust, and, therefore, within the exception of sections 217 and 218.

It is a resulting trust, because the purchase money was paid to the defendant for one undivided half of the premises *before* the purchase from the Government. I know that the court below assumed that it was paid *after* the purchase, but I take issue with it upon the fact. That depends upon the language and construction of the complaint. As I read it the court below was in error and clearly in error. The complaint alleges that the plaintiffs were in possession on the 18th of September, 1878, and continued in possession until the 15th of March, 1881 (Record, page 1); that in the month of February, 1881, the agreement was made by which the defendant was to be let into posession, and purchase the premises jointly, and that they "*thereafter* paid to defendant their share "of the purchase money of said premises, and that *there-*"*after*, to wit, or about the 15th of May, 1881, the de-

" fendant, in pursuance of said agreement and of said " trust, purchased from the United States of America, for " the use and benefit of the plaintiffs, an undivided one- " half of said premises, as well as another undivided one- " half for his own use and benefit, and took from the " register and receiver of said land office a certain final " receipt for the purchase price of said premises." (Record, page 2, folio 4.)

Here is a specific allegation that plaintiff's share of the purchase money was paid to the defendant *before* he purchased of the United States.

Such payment, by operation of law, created a resulting trust in the defendant for the benefit of the plaintiffs, and by all the authorities, and they are exceedingly numerous, took the case out of the statute.

Browne on the Stat. of Frauds, § 83, says :

" The eighth section of the English Statute of Frauds, " however, expressly enacts that the statute shall not apply " to any cases of trusts arising by act or operation of law " upon any conveyance of any lands or tenements, and it " may be convenient to examine what are the trusts here " referred to, so as to arrive at a clear understanding of " the subject-matter to which the statute applies before " proceeding to inquire what are the formalities which it " requires to be observed."

§ 84. " In *Lloyd* v. *Spillet*, Lord Hardwicke took occa- " sion to classify these trusts by act or operation of law, " and he divided them into three classes : *First*, where an " estate is purchased in the name of one person but the " money or consideration is given by another, and a trust " in the estate results to him who gave the money or " consideration. * * * These resulting trusts are " not the creations of the statute, and in declaring " them to be provable by parol it has only affirmed " the common law. * * * They do not depend upon " any agreement between the parties, but are mere impli- " cations of law from the fact of the purchase with anoth-

" er's money. * * * They arise upon actual convey-
" ance of land and not upon an executory contract to hold
" land in trust.

" § 85. Resulting trusts of the first class, in which the
" purchase money is paid by one and the deed taken in
" the name of another, may be *pro tanto*, or for a part of
" the estate proportionate to such part of the purchase
" money as the *cestui que trust* may have advanced."

Crop v. *Norton*, 9 Mod. 233, 2 Atk. 74; *Wray* v. *Steele*, 2 Ves. and Bea. 388; *Benbow* v. *Townsend*, 1 Mylne and Keen, 506; *Dale* v. *Hamilton*, 5 Hare. Ch. 369; *Ryall* v. *Ryall*, 1 Ark. 58; *Buck* v. *Swazey*, 35 Maine, 41; *Livermore* v. *Aldrich*, 5 Cush. 435; *Powell* v. *The Monson Co.*, 3 Mason, 362; *Botsford* v. *Burr*, 2 Johns. Ch. 405; *Stark* v. *Cannady*, 3 Littel, 399; *Ross* v. *Hegeman*, 2 Edwards Ch. 373; *Larkins* v. *Rhodes*, 5 Porter, 195; *Cecil Bank* v. *Snively*, 23 Maryland, 261.

Story Eq., § 1201, says:

" Upon similar grounds, where a man buys land in the
" name of another and pays the consideration money, the
" land will generally be held by the grantee in trust for
" the person who so pays the consideration money. This
" as an established doctrine is now not open to contro-
" versy."

Com. Dig. Chancery, 3, W. 3; 2 Foubl. Eq., B. 2, Ch. 5, § 1, note (a); 3 Wooddes, Lect. 57; Co. Litt, 290; Sugden on Vendors, Ch. 15, § 2; *Young* v. *Peachy*, 2 Atk. 256; *Lloyd* v. *Spillet*, 2 Atk. 150; *Scott* v. *Fenhoullet*, 1 Bro. Ch. 69; *Lane* v. *Dighton*, Ambler, 409; *Finch* v. *Finch*, 15 Ves. 50; *Wray* v. *Steele*, 2 V. and Beam, 388; *Boyd* v. *McLean*, 1 Johns. Ch. 582; *Botsford* v. *Burr*, 2 Johns. Ch. 405; *Steere* v. *Steere*, 5 Johns. Ch. 1; *Powell* v. *Munson*, 3 Mason, 362, 4 Kent, 61; *Jackson* v. *Moore*, 6 Cow. 706; *Peabody* v. *Tarbell*, 2 Cush. 232; *Barnard* v. *Jewett*, 97 Mass. 87; *Nixon's Appeal*, 63 Penn. State, 279; *Robinson* v. *Robinson*, 22 Iowa, 427; *Snell* v. *Elam*, 2 Hieskel, 82.

II. Taking possession under the contract is such part performance as takes the case out of the statute.

That such possession was taken is admitted by the demurrer. The complaint alleges that the plaintiffs were in possession when the contract was made, and that they agreed "to relinquish and give up *the* possession of said "premises to said defendant," and "that, relying upon "the good faith and honesty of the defendant, plaintiffs "thereupon relinquished and delivered their possession "of said premises to the defendant, and that the defend- "ant then and there was *admitted and went into posses-* "*sion of the same in compliance with and under said agree-* "*ment and said trust.*" (Record, page 2, folio 4.)

If the defendant "*went into possession*" under said agreement he could not have been in possession before. To pretend that he was is giving to the language used an entirely different signification from what would be generally understood and is doing violence to the plain meaning of the words.

The taking of possession under the contract is alone and of itself sufficient to take the case out of the statute.

This rule is well settled.

It is founded upon the principle that if there be no valid agreement, in law or equity, the person who has taken possession with the consent of the vendor is made a trespasser, and is liable as a trespasser, a position which would amount to a fraud practised upon him by the vendor.

Browne, Stat. Frauds, § 467, says:

"And it is well settled that possession alone, without "payment or other acts of ownership, is sufficient part "performance of a verbal contract for land to sustain a "decree for its specific execution."

Fry, Specific Performance, § 579, says:

"Possession is, it must be observed, part performance, "both by and against the stranger and the owner; the "owner has allowed the stranger to do an act on the faith "of the contract, viz., enter on the land; the stranger has "allowed the owner to do an act on the faith of the con- "tract, viz., withdraw from the land. They are therefore "both bound."

Wood on Frauds, Sec. 488; *Barett* v. *Gomsera*, Bunb. 94; *Earl of Aylesford case*, 2 Strange, 783; *Pyke* v. *Williams*, 2 Vern. 455; *Lacon* v. *Merkins*, 3 Atk. 1; *Willis* v. *Stradling*, 3 Ves. 381; *Bowers* v. *Katon*, 4 Ves. 91; *Gregory* v. *Mighell*, 18 Ves. 328; *Kine* v. *Balfe*, 2 Ball & B. 343; *Pain* v. *Coombs*, 1 De G. & J. 34; *Coles* v. *Pilkington*, L. R., 19 Eq. 174; *Tilton* v. *Tilton*, 9 N. H. 386; *Pindall* v. *Treon*, 30 Ark. 249; *Eaton* v. *Whitaker*, 18 Conn. 222; *Murray* v. *Jayne*, 8 Barb. 612; *Malins* v. *Brown*, 4 N. Y. 403; *Ryan* v. *Dix*, 34 N. Y. 307; *Johnston* v. *Glancy* 4 Blackf. 94; *Anderson* v. *Simpson*, 21 Iowa, 399; *White* v. *Watkins*, 23 Mo. 423; *Cattell* v. *Bacon*, 33 Miss. 269; *Reynolds* v. *Johnson*, 13 Tex. 214; *Harris* v. *Crenshaw*, 3 Rand. 14; *Wells* v. *Stratton*, 1 Tenn. Ch. 328; *Avington* v. *Porter*, 47 Ala. 714; *Reed* v. *Reed*, 12 Penn. State, 117; *Sands* v. *Thompson*, 43 Ind. 18; *Warton* v. *Slaughtenbaugh*, 35 N. Jer. 266; *Graham* v. *Weis*, 47 Ga. 479; *Purcell* v. *Miner*, 4 Wall. 513; *Brown* v. *Sutton*, 129 U. S. 242, 248.

I think I have made good all the propositions I undertook to establish, and I believe it will be the pleasure of this Court, as well as its duty, to make an honest man of this defendant, so far as his dealing with the plaintiffs in this transaction is concerned.

I ask that the judgment of the court below be reversed.

Respectfully submitted.

WALTER H. SMITH,
Att'y for Appellants.

JAN 6 1891
JAMES H. MCKENNEY
CLERK

Supreme Court of the United States.

OCTOBER TERM, 1890.

No. 777.

JOHN DUCIE AND JAMES A. MURRAY, APPELLANTS,

vs.

THOMAS FORD.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF MONTANA.

Brief on Behalf of Thomas Ford, Appellee.

M. F. MORRIS,
For Appellee.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

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I.

STATEMENT OF CASE.

This case comes up on demurrer to the complaint; the demurrer having been sustained both by the District Court and the Supreme Court of the Territory, and the complainants having elected not to amend but to submit to a final decree on the demurrer.

The suit is one to enforce specific performance of an alleged verbal contract in regard to real estate, confessedly void under the statute, but sought to be maintained on the ground of part performance thereof by the complainants.

The demurrer was sustained on the ground that no such part performance was sufficiently shown, and because the allegations of the complaint were vague, contradictory, and insufficient.

The allegations of the complaint are substantially these: The complainants, on September 18, 1878, located certain mining property under the name of the Fiji lode; and claim to have maintained possession of it until March 15, 1881. The defendant had located the same property under the name of the Odin lode, and was proceeding to procure a patent for it from the United States, when, about February, 1881, the complainants notified him that they claimed the property and would contest his application. Thereupon, if we believe the complainants, the parties entered into a verbal agreement, whereby the complainants agreed to relinquish the possession of the premises to the defendant, and should abstain from contesting his title; and the defendant, after procuring his patent, should convey one-half interest therein to the complainants. The complainants allege that they performed their part of this agreement, abstained from contest, permitted the defendant to get the patent, and paid him from time to time their share of the purchase-money, the amount of which, however, they do not state.

The patent was granted on or about February 1, 1886. On August 2, 1886, the complainants allege that they made demand on the defendant for the conveyance to them of one-half interest; and that the defendant refused to make the conveyance. They add, that the premises are valuable; that it is impossible that the complainants could be restored to the position occupied by them before the agreement; and that they are willing to pay to the defendant whatever is due on account of the patent.

The prayer of the complaint is for a conveyance by the defendant of one-half interest in the premises, and for an account of rents and profits.

As already stated, the complaint was, on demurrer, held

to be insufficient to justify the intervention of a court of equity; and the complainants having no better statement to make, and being unable to meet the objections suggested in the lower courts, a final decree was entered, from which the present appeal was taken.

II.

BRIEF OF ARGUMENT.

1.

The assignment of errors here, and the only assignment, is that the Supreme Court of the Territory erred in sustaining the demurrer to the complaint. This scarcely seems to be a sufficient compliance with the law or the rules of this court.

Lucas *vs.* Brooks, 18 Wallace, 91.
Michaels *vs.* Post, 21 Wallace, 398.
Stevens *vs.* Gladding, 19 Howard, 64.
Benites *vs.* Hampton, 123 U. S., 519.

2.

The complaint here is an "amended complaint." Presumably the complainants were compelled by a previous demurrer to amend their original statement; and presumably, as they elected to stand by it, they had no better statement to make, and were unable to remove the objections to it for insufficiency, indefiniteness, and obscurity pointed out by both the district and supreme courts of the Territory. While, therefore, under the rules of pleading, the facts stated in the complaint are for the present purpose presumed to be true, that other rule of pleading also is to be applied that only those things that are well pleaded are presumed to be true; and where there is doubt and difficulty and obscurity, such doubt and difficulty and obscurity are to be construed

most strictly against the party who could remove them, and who refuses or is unable to do so. If the defendant sought to escape the expense and trouble of a long trial, and therefore took the risk of a demurrer, he should not be charged, as he is now sought to be charged, with dishonestly seeking to evade the performance of his just obligations; and it is incumbent on the complainants to show plainly and clearly and without equivocation that they are entitled to hold him liable. If, for instance, it be true that they paid to the defendant their share of the purchase-money to obtain the patent, it was easy enough for them to say how much they paid, and when they paid it. They persistently refuse to throw any light whatever on this point. They persistently refuse to remove or explain the inconsistency between their allegation that they had paid their portion of the purchase-money and their offer to pay whatever was due from them on account of the patent. They persistently refuse to state, as suggested to them by the territorial court, that they had complied with the necessary prerequisites to render their location of the mine a valid and subsisting one; or that they had the necessary capacity to take the title if it should be decreed to them. And if they were honest in their pretensions, and if this suit were a *bona fide* suit based upon just grounds of equity, they would not have hesitated to do so. The inevitable inference is that their location of the mine was not a valid one; that they had not done any such work upon the mine as would have entitled them by law to any standing in the premises; that they were aliens incapacitated by law to take title to the property; and that their pretended possession was a fraud.

3.

The agreement set forth by the complainants and relied on in this case is expressly stated by them to have been merely a verbal one. It is confessedly void, therefore, under the

statute of frauds in force in the Territory, unless exempted from the operation of that statute by its own terms or taken out of its operation by some principle or rule of equity.

The statute of frauds in force in the Territory, and which is based on the statute of 29 Charles II, is to be found in chap. XIII, art. I, of the Revised Statutes of Montana of 1879. The provisions of the statute which bear upon the question in controversy here are printed in the brief filed in this cause for the appellants, and it is therefore deemed unnecessary to reprint them here.

It is sought to be shown on two grounds that the contract in question, although merely a verbal contract, is not within the operation of this statute. These two grounds are:

1st. Because the appellants had paid the purchase-money to the defendant; and there was, therefore, a resulting trust arising by operation of law, which is specifically exempted by the statute itself from its operation.

2d. Because there was part performance of the contract by the appellants, which, by the usual rule of equity, would take the case out of the operation of the statute.

As to the first ground, that there was a resulting trust in this case arising by operation of law from the payment of the purchase-money by the appellants, it seems sufficient to say that it does not appear that the purchase-money was paid in advance by the appellants, and that therefore there was a resulting trust in their favor. The allegation of the complaint in this regard is this:

"They (the appellants) withdrew all objections, protest, and adverse claims to or against the defendant's claim, and abstained from filing any adverse claim or protest in the United States land office against defendant's application, and thereby permitted and enabled the defendant to procure a patent for said premises, and from time to time thereafter

paid to defendant their share of the purchase-money of said premises; and that thereafter, to wit, on or about the 15th day of May, 1881, the defendant, in pursuance of said agreement and of said trust, purchased from the United States of America, for the use and benefit of the plaintiffs, an undivided one-half of said premises, as well as another undivided one-half for his own use and benefit, and took from the register and receiver of said land office a certain final receipt for the purchase price of said premises." (Rec., p. 2.)

It is claimed that this allegation shows that the appellants paid to the defendant one-half of the purchase-money before he made the purchase. But the best that can be said of the allegation is that it shows with equal clearness that the appellants first enabled the defendant to procure the patent, and *thereafter from time to time* paid to him their share of the purchase-money. Is this the kind of showing upon which a resulting trust is to be raised? Is this the proof upon which title to valuable property is to be taken from one man and vested in another? The appellee, of course, cannot show here that this talk about the payment of purchase-money is the merest pretense and utterly without foundation. He is compelled to admit the statement for the purposes of this argument. But, admitting it for what it is worth, he is entitled to insist upon his legal rights, and that his property should not be taken from him upon such loose, inconsistent, and insufficient statements as are here made by the appellants.

Moreover, as we have already stated, it does not appear what sum or sums were paid, or when or how they were paid: and there was nothing easier than for the complainants to have shown this, if their statement was at all founded upon truth. Their attention was called to this; and yet they failed or refused to supply the deficiency. And the only just inference is that they could not supply it, and that

their pretense of having paid money was nothing but pretense.

It is laid down as elementary law by every text-book on equity that the parol evidence to establish a resulting trust "*must be clear, strong, unequivocal, unmistakable, and must establish the fact of the payment by the alleged beneficiary beyond a doubt.*" And it must also be shown beyond a doubt that the payment was made at or before the time of conveyance.

Pomeroy's Equity Jurisprudence, sections 1037, 1040, and cases collected in notes to latter.

Olcott *vs.* Bynum, 17 Wall., 44.

It would most assuredly be absurd to claim that the allegation of the complaint, presuming it to be true or to be taken as proved, responds to this plain principle of justice and fundamental rule of equity.

We submit, therefore, that the theory of a resulting trust is untenable.

The second ground, that of part performance of the contract by the appellants, is no more tenable than the first.

The allegation of part performance is as loose, inconsistent, insufficient, and unsatisfactory as is the proof of a resulting trust. It is simply to the effect that the appellants abstained from antagonizing the defendant's claim and from interposing any adverse claim of their own; and that they relinquished possession of the premises to the defendant. The payment of the purchase-money would seem also to be claimed as part performance; but this claim is so obscure, and so inconsistent with the theory of a resulting trust that it does not demand much consideration.

Now, abstention on the part of the appellants from antagonizing the defendant's claim and from interposing any adverse claim of their own, does not of itself constitute any consideration for anything. It is no more than is done by all the world—by all persons who have no interest in the sub-

ject-matter. It should appear, at least, that the appellants had a plausible claim; that their adverse intervention would have had plausible grounds; and that their abstention was reasonably worth something to the defendant. An agreement by third parties not to interfere in an application by a claimant to the United States for a patent is no valid or legal agreement at all—is no more than their positive duty, unless they have good grounds, or at least plausible grounds, for interference. Such grounds, therefore, should have been made to appear; and unless they are made to appear, the alleged agreement must be treated as worthless. This would seem to be too plain to require much argument, and it does not seem that the appellants now place much reliance upon these circumstances.

The fact, or alleged fact, of the relinquishment of the possession of the premises by the appellants to the defendant is the part performance of the alleged contract upon which reliance is now mainly, if not exclusively, placed. Again occurs here the same difficulty of loose and indefinite statement on the part of the appellants. Unless their possession was a valid one, or there were at least plausible grounds for maintaining its validity, the relinquishment of such possession was no more than the removal of trespassers from premises upon which they had no right whatever of any kind to be. Now, while the appellants claim possession of these premises in themselves under a pretended location thereof by them, they admit a prior and superior possession in the defendant; for they admit that the defendant had already located the property, and was at the very time proceeding to procure a patent for it from the United States. Their allegation of possession and ownership, therefore, is distinctly contradicted by their simultaneous admission of possession and ownership by the defendant. Now, in order to take a case out of the operation of the statute of frauds on the ground of part performance, such part performance must be

conclusively proved, or distinctly and unequivocally shown. It would be absurd to claim that there is such unequivocal showing in this case.

Purcell *vs.* Miner, 4 Wall., 513.
Williams *vs.* Morris, 95 U. S., 444.
Semmes *vs.* Worthington, 38 Md., 298.
Dunply *vs.* Ryan, 116 U. S., 491.

"The proof must be clear, definite, and conclusive," say the authorities; and acts of part performance, if they are such in reality, are as much part of the contract as any other. But, as the supreme court of the Territory remarked in its opinion (Rec. p. 10), these alleged acts of the appellants were only ancillary, introductory, or preparatory, and were not parts of the contract: and therefore, under all the authorities, are not to be considered part performance.

So, even if we concede the propositions of law contended for on the other side to be good, the difficulty here is that they are entirely inapplicable for want of a proper showing of facts upon which to base them. And it is not to be forgotten that the appellants, having their attention directed on at least three separate occasions to the vagueness and insufficiency of their allegations, were utterly unable to improve them. We are, therefore, conclusively to presume that they could absolutely prove not one single fact or circumstance in aid of their case beyond what they have stated in their complaint. Upon such allegations and such proof, if wholly uncontradicted or even confessedly conceded to be true, no man should have the title to his property liable to be divested out of him.

4.

There is one other point which we would note.

The impression is given in the brief of counsel for the appellants (page 7) that the supreme court of the Territory by a majority vote, two justices against the chief justice, who

did not concur, decided this case on the ground that the complaint was fatally defective because it did not state that the complainants were citizens of the United States, or had declared their intention to become such. We do not believe that it was the intention of counsel to give this impression, and yet it is fairly deducible from his statement and from the context.

Now, the court below, as the record shows, was unanimous in their opinion that the contract sued on by the complainants was void under the statute of frauds, and that there was neither resulting trust nor part performance shown in the case. It is true that the territorial court in its opinion noted other points in the case which it regarded as insufficient, and among them the absence of any allegation on the part of the complainants of their capacity as citizens to take this land if it were awarded to them. The chief justice of the court simply reserved his opinion on that point.

There is nothing in the record to show, as counsel's brief goes on to state (page 7), that this point originated with the court and was not made by the defendant's counsel; but it does not make much difference where or how it originated if it is well founded in law.

The laws of the United States (Rev. Stat., sec. 2319) reserved the mineral lands of the United States to citizens and those who have declared their intention to become such; and require preliminary proof of this fact as a condition precedent to any grant of such lands. Such being the case, it would seem to be a necessary deduction that in a suit for the assignment of a patent, such as the present suit is, this essential preliminary should be shown. It is only fair and just to infer that, after their attention was specially called to it and they failed even then to show it, the appellants were, in fact, unable to show it; and for this reason they have been prudently silent upon the subject.

It is claimed, however, that the allegation of *ownership* of the premises made by the appellants covers and implies all

this. It certainly does not, any more than a claim of indebtedness is a sufficient allegation of indebtedness without a statement of the facts from which the indebtedness arises. *Allegation* is not to be confounded with *proof;* but allegation, and a reasonable allegation of facts, with a reasonable particularity of detail, is required as an essential prerequisite to the admissibility of proof. And a condition precedent is a matter both to be alleged and proved.

As to the alleged *ownership* of the complainants in this case, it is plain from their own statement that it was merely a pretense and sham. Else, why did they so easily admit the superior possession and the superior *ownership* of the defendant, and allow him to put himself forward as the actual owner? Did they intend to perpetrate a fraud upon the United States?

It is very true that *ownership* may sometimes be a conclusion of fact as well as a conclusion of law, and that it may even imply all necessary and proper prerequisites. If the defendant in this case, for example, were to sue, and to allege that he was the *owner* of this land under and in pursuance of a patent to him from the United States, that would be a sufficient showing of his preliminary capacity as a citizen to take the patent; for such capacity under the law must have been proved before the patent was granted. But an allegation of *ownership* of land, where, in the very same breath it is admitted that such ownership is contested, and that in fact it does not exist, is proof of nothing but the reckless insufficiency of allegation to which the appellants have been compelled to resort.

This is a proceeding in which the appellants are virtually trying to get a patent. They must show themselves entitled to it. They must show that they have complied with all the essential prerequisites of the law. Their theory is that the defendant acted as trustee for them to the extent of one-half of the property. They must be as competent to take that one-half as he was; otherwise their action is a